No. 96-1277

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM BRANCH,

Petitioner,

—v.—

STEPHEN L. GELBAND, MORRIS K. NACHTOMI, TOWER AIR, INC., GOLDMAN SACHS & CO., LEHMAN BROTHERS, INC. and MORGAN STANLEY & CO. INCORPORATED,

Respondents.

In re: Tower Air, Inc. Securities Litigation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT-PLAINTIFF CLASS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the approval by the District Court of the settlement of a securities class action, as affirmed by the Second Circuit, constitute an abuse of discretion or plain error of law?

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I. Opinions Below

The order of the United States Court of Appeals for the Second Circuit (the "Second Circuit"), dated November 13, 1996, is reprinted in Petitioner's Appendix. (Petitioner's Appendix ("P. App.") at A1-2). The order of the Second Circuit affirmed an order of the United States District Court for the Eastern District of New York (the "District Court"), dated

February 9, 1996, which is reprinted in Petitioner's Appendix. (P. App. at A3-37).

II. Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 13, 1996. Petitioner states that jurisdiction is invoked under 28 U.S.C. § 1254 (1).

III. Preliminary Statement

In the Petition, Petitioner, the alleged owner of 100 shares of common stock of Tower Air, Inc. ("Tower Air") and the sole Objector to a securities class action settlement, makes the same specious arguments which were litigated and rejected in connection with the settlement before the District Court, and which the Second Circuit resoundingly rejected as "without merit".

The Petition is premised upon the belief that each of the lower courts misconstrued and improperly evaluated the factual circumstances surrounding Petitioners' claims. Because Petitioners' arguments are factual in nature, the Petition presents no issue which is appropriate for review by this Court. Traditionally, the Court has declined to grant a petition for certiorari when the matters presented depend upon an interpretation of the evidence.

This litigation arose from alleged misrepresentations and omissions in the Tower Air initial public offering prospectus regarding Tower Air's heavy reliance on charter business for the annual Muslim pilgrimage known as the Hadj (the "Hadj claims"). Petitioner, the purchaser of 100 shares of Tower Air for about $1600, claims that the Settlement is inadequate since it releases additional claims (the "non-Hadj claims") which he first raised in another subsequent purported class action arising from the Tower Air initial public offering.

The non-Hadj claims consist of a slew of nit-picky, non-material complaints primarily about the quality of Tower Air, and assertions of accounting errors demonstrating an utter lack of knowledge of basic accounting principles. Petitioner even concedes that no securities law damages can be attributed to the non-Hadj claims. The non-Hadj claims were found by the District Court to be risky, both as to liability and, especially, as to damages.

After 1 1/2 years of litigation, a $2.5 million Settlement was negotiated with the assistance of Magistrate Judge Roanne Mann, at arm's length, and by experienced counsel. Due notice of the proposed Settlement and the Settlement Hearing ("Settlement Hearing") was provided to the Class (Docket Entries Nos. 49-50); Petitioner was given access to all discovery materials obtained by Class Counsel during discovery (Docket Entry No. 43); and, Petitioner was given ample opportunity to present objections at the Settlement Hearing, which he did. (Joint Appendix filed in Second Circuit ("JA") 369-79; 993-1019).

Notably, Petitioner does not contend that the $2.5 million settlement is not a fair, reasonable and adequate settlement of the "Hadj claims"; only that $2.5 million was inadequate to also settle the non-Hadj claims. (JA 1019-1049).[1]

The District Court carefully analyzed all of the factors necessary to test the appropriateness of a class action settlement and correctly concluded that the Settlement was "fair, just and appropriate." The Second Circuit found that the District Court "meticulously considered" the appropriate factors before approving the Settlement and that Petitioner's arguments were "without merit."

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[1] To place this $2.5 million settlement in perspective, the Class' damages expert opined that maximum recoverable damages would be about $12 million; Objector's expert calculated maximum damages at $23 million (though, incredibly, as discussed *infra*, he does not attribute *any* of these "damages" to the non-Hadj claims and completely misapplies controlling legal authority for calculating damages).

This case involves no conflict among the courts of appeal or important and unsettled issue of federal law. The controversy arises in the context of a straight-forward compromise and settlement under the federal securities laws. The task of the lower courts was not to decide Petitioners' claims on the merits but to determine whether the compromise and settlement is fair and reasonable in light of all of the circumstances.

Petitioner makes no attempt whatsoever to establish that the District Court or the Second Circuit abused its discretion in approving the Settlement. Quite simply, Petitioner presented his objections and they were rejected by the lower courts. Petitioner repeatedly was offered the opportunity to opt-out of the Class, but he refused. Petitioner's real concern is obviously the effect this Settlement had on the competing Class Action which he filed in a different jurisdiction after learning that this Action was filed. That simply is no basis to reject this extraordinary Settlement.

Accordingly, the judgment should be affirmed, with sanctions imposed on Petitioner's counsel.

IV. STATEMENT OF THE CASE

A. Procedural History

On February 9, 1996, a hearing was held before District Judge Reena Raggi of the United States District Court for the Eastern District of New York to determine the fairness and adequacy of the proposed Settlement of this consolidated securities class action. After careful consideration of the terms of the Settlement, the process by which the Settlement was reached, the claims and defenses asserted by the parties, and the objections raised by Petitioner, Judge Raggi approved the Settlement as fair, reasonable, and in the best interests of the Class. A final order and judgment was thereafter entered dismissing with prejudice and releasing the claims of the members of the Class, including Petitioner. Petitioner was

repeatedly afforded the opportunity to opt-out of the Settlement and pursue his individual claims, but refused to do so.

Petitioner appealed the District Courts' final order, and the Second Circuit entered an order affirming the decision of the District Court on November 13, 1996. The Second Circuit held that the District Court had "meticulously considered the appropriate factors [for approving the settlement] and we see no abuse of discretion in its approval of the Settlement. We have considered all of appellant's contentions on the appeal and have found them to be without merit."

B. Background of the Initial Public Offering

On or about November 15, 1993, 3,750,000 shares of Tower Air common stock were sold to the public, at a price of $15.50 per share, in an initial public offering which raised $58 million (the "IPO"). These shares were registered with the Securities and Exchange Commission (the "SEC") pursuant to a registration statement on Form S-1 (the "Registration Statement") and sold pursuant to an offering prospectus (the "Prospectus") (JA 823-908) declared effective on and dated November 15, 1993. The Registration Statement and Prospectus portrayed Tower Air as a company destined for growth despite the problems and consolidations that the airline industry in general was experiencing. Central to Tower Air's growth and profitability, as represented in the Registration Statement and Prospectus, was "Tower's increased participation in charter services catering to seasonal religious pilgrims." (JA 846).

C. The Litigations

This litigation arises from the sharp decline in the price of the common stock of Tower Air following the Company's announcement on or about March 23, 1994 that it had failed to secure contracts for the transportation of Muslim pilgrims from Indonesia to Saudi Arabia during the 1994 Hadj. The Hadj is a pilgrimage made by observant Muslims to Mecca during the month of Ramadan, Islam's holiest season.

Specifically, on March 23, 1994, Tower Air disclosed that it had been informed by PT. Garuda Indonesia ("Garuda"), the Indonesian national airline, that Garuda would not enter into a contract with Tower Air for the transport of religious pilgrims during the 1994 Hadj. In a Company press release, Tower Air shocked the investing community by disclosing for the first time that the prior year's contract with Garuda had accounted for 8.1 percent of Tower Air's entire revenues for the fiscal year 1993 and that such a large percentage of revenues was concentrated in one customer. In response to this disclosure, the price of Tower Air common stock declined by 23% (Docket Entry No. 52, Brown Declaration, Ex. E-18).

Respondent Ari Parnes commenced the first of the two actions comprising this consolidated litigation in the Eastern District of New York on March 24, 1994. That action—*Parnes v. Stephen L. Gelband, et. al.*, No. CV 94-1347 (Raggi, J.)—asserted claims pursuant to Sections 11, 12(2) and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77k, 77l(2) and 770, against Tower Air and two of the Company's officers and directors, Morris Nachtomi and Stephen L. Gelband (the "Individual Defendants") (Docket Entry No. 1). On June 7, 1994, a second action, *Leslie Susser v. Stephen L. Gelband, et al.*, No. CV 94-2708 (Raggi, J.), was commenced in the Eastern District of New York against the same defendants named in the *Parnes* action asserting essentially identical claims. These actions were consolidated by order of the Court on June 30, 1994 (Docket Entry No. 9) and are referred to herein as the "Action."

Substantial documentary discovery from all of the defendants and a key non-party witness followed, as well as deposition and document discovery by defendants of class plaintiffs Parnes and Susser. (JA 756-61). Following consolidation, on August 18, 1994, Respondents served a Consolidated Amended and Supplemental Class Action Complaint (the "Complaint"). The Complaint added the underwriters of the Offering as defendants in the action: Goldman, Sachs &

Co., Morgan Stanley & Co., Inc. and Lehman Brothers, Inc. (the "Underwriter Defendants") (Docket Entry No. 13).

The Complaint alleged that the Registration Statement and Prospectus contained untrue statements of material fact or omitted to state material facts necessary to make the statements therein not misleading. Respondents predicated their claims on the alleged failure to adequately disclose in the Registration Statement and Prospectus that more than eight percent of Tower Air's annual revenue for fiscal 1993 was derived from a one-year contract with a single customer—Garuda—and the alleged misrepresentation that Tower Air anticipated securing future Hadj contracts, when, it was alleged, Tower Air was aware, at the time of the IPO, that the renewal of the contract by Garuda was questionable.

In September 1994, after the existence of this lawsuit was publicly disclosed in a Tower Air 10-Q (Docket Entry No. 52, Brown Declaration Ex. H), the Petitioner William Branch filed a purported class action complaint (the "Branch Complaint") in the Southern District of New York, also on behalf of Tower Air stock purchasers in the IPO (as well as those who voted at its annual meeting). *William Branch v. Tower Air, Inc. et. al.*, No. 94 Civ. 6625 (JFK) (the "Branch Action"). The Branch Complaint asserted the "Hadj claim", together with a slew of "non-Hadj claims". These "non-Hadj" claims[2] asserted that Tower Air, in its IPO Prospectus:

> a. failed to disclose the difference between the book value and the fair market value of Tower's flight equipment;

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[2] Class counsel first became aware of the allegations raised in the Branch Complaint while conducting discovery of the documents produced by Tower in the summer of 1994. Prior to filing the Branch Complaint, Avrom S. Fisher, attorney for Petitioner Branch, wrote a letter to Tower in which he asserted the substance of these claims. After discovering this letter in the documents produced by Defendants, Plaintiffs' Counsel preliminarily reviewed these allegations and found them to be, at best, essentially immaterial, and, at worst, bordering on, if not totally, frivolous. (JA 758).

b. misstated the estimated costs of periodic aircraft maintenance and overhaul, including estimated costs of compliance with certain Aging Aircraft Airworthiness Directives ("ADs") promulgated by the Federal Aviation Administration ("FAA");

c. misstated the ability of Tower to compete with El Al on the New York to Tel Aviv route, including Tower's ability to fly this route non-stop;

d. misstated Tower's ability to compete with other carriers on the basis of "quality," including allegations with respect to: (i) the number of passenger complaints to the United States Department of Transportation; (ii) the number of passengers involuntarily denied boarding; (iii) suspensions by the military from performing military charters; and (iv) Tower's rate of in-flight engine shutdowns;

e. stated without reasonable basis that Tower anticipated obtaining religious pilgrimage business in future years;

f. misstated a policy of minimizing fixed costs and failed to disclose that many of the expenses incurred were non-variable costs;

g. misstated revenues by including therein the full posted tariff fare as opposed to the "discounted" fare actually paid by the consumer; and

h. failed to disclose the alleged use by Tower's Chief Executive Officer and controlling stockholder, Morris Nachtomi, of an apartment in Trump Tower owned by Tower as his personal residence.

As is clear from the record, the District Court and Second Circuit properly analyzed and rejected these claims. Accordingly, Petitioner is improperly attempting to reargue what are essentially factual disputes.

Branch opposed a motion to transfer his action to the Eastern District, where it could have been consolidated with this Action. The Branch Action was dismissed by Judge John F. Keenan of the Southern District in November 1995, with leave to replead certain claims (JA 909-29). The Settlement released the claims in this Action (which, as part of the Settlement, was expanded to include the claims first raised in the Branch Action).

Respondents conducted extensive discovery of all the allegations contained in the Complaint and the Branch Complaint both prior to and after the settlement in principle was reached. Respondents reviewed and analyzed thousands of pages of documents produced by Defendants and by Tower Air's agent with respect to the Garuda contract. Respondents also deposed three of Tower Air's high ranking officials, including: (1) Morris Nachtomi, Co-Founder, Chairman and Chief Executive of Tower Air (JA 38-184); (2) Josefina Essex, Tower Air's current Chief Financial Officer (JA 185-228); and, (3) William J. Cain, Tower Air's Vice President of Maintenance. (JA 229-291).

D. Settlement Discussions

After nearly 1 1/2 years of active litigation, Class Counsel negotiated the instant Settlement. Eastern District Magistrate Judge Roanne Mann facilitated the negotiations by conducting an extensive settlement conference in chambers (Docket Entry No. 26), allowing all of the parties to the Action to present their views, together, and then separately to the Court. Notably, the parties fully explained to Magistrate Judge Mann the existence of the Branch Action, the basis of the non-Hadj claims and the intention that any settlement cover all claims arising from the IPO. (JA 768-69). Armed with all of that information, the Magistrate Judge suggested a take-it-or-leave-it global settlement sum: $2.5 million. (JA 769).

After weeks of consideration by all parties, the settlement suggested by Magistrate Judge Mann was accepted. (JA 769).

It is undisputed that as a part of the Settlement process, Respondents amended their complaint to expressly allege the non-Hadj claims and to expand the Class Period in order to give assurance to Defendants that their payment of $2.5 million would cover all claims arising from the IPO and the facts underlying such claims. This very procedure is quite common where there are overlapping lawsuits, and has been expressly approved by the Second Circuit. See *Weinberger v. Kendrick*, 698 F.2d 61, 68, 77 (2d Cir. 1982).

Respondent-Plaintiff Class Counsel retained Professor Gregg A. Jarrell, former chief economist of the Securities and Exchange Commission, to review the materiality of the Hadj and non-Hadj claims, to perform a damages analysis both as to causation and magnitude, and to review the terms of the Settlement and opine on its adequacy. (JA 527-40).

Professor Jarrell concluded that: (1) only the Hadj claims had a material impact on Tower Air's stock price; (2) that the non-Hadj claims were not of the type of information which would be material to a reasonable investor; and, (3) that the non-Hadj claims never impacted Tower Air's stock price. Professor Jarrell calculated maximum likely recoverable damages at approximately $12 million. Based on the foregoing, Professor Jarrell opined that, from an economic perspective, the Settlement was fair, reasonable, and adequate. (JA 527-40).

The $2.5 million cash settlement represents a superb result because it settles claims that would have been difficult, if not impossible, to prove, and because it provides an immediate cash benefit to the Class. Both lower courts have determined that the Settlement is fair, reasonable and not a product of collusion.

E. The District Court Approves The Settlement

Following an extensive Settlement Hearing at which Petitioner presented all of his objections (based, inter alia, on a review of the entire discovery record in the Action) (JA 993-1032), the District Court articulated in a careful and reasoned

manner a complete analysis of all of the criteria necessary to judge a settlement under the seminal decision of *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) and its progeny. (JA 1033-48).

The District Court concluded that the Settlement, negotiated by experienced plaintiff's counsel after significant discovery, was "fair, just and appropriate." (JA 1037-38;51).

The District Court evidenced a complete familiarity with the record and the objections. The District Court noted that the "strongest claim that can be advanced under the securities law" was the "Hadj claim" (JA 1036); that "there are triable issues, but that seems to me to be the issue on which the class was most likely to achieve any recovery." (JA 1036).

The District Court was particularly sensitive to the critical issue of whether any of the non-Hadj claims caused any securities law damages. "[T]he real bottom line problem I have with many of these [non-Hadj] claims is the ability to show that they caused securities law damages. . . . " (JA 1036). "The risks of establishing damages here seems even higher to me [than of proving liability] and particularly with respect to the [non-Hadj] claims. . . . [T]he risks of establishing damages are very high here." (JA 1039-40).

Thus, after careful consideration of the terms of the Settlement, the process by which the Settlement was reached, the claims and defenses asserted by the parties, and the objections raised by Petitioner, Judge Raggi approved the Settlement as fair, reasonable, and in the best interests of the Class. (JA 1042-43).

V. No Basis Exists for the Issuance of a Writ of Certiorari

Petitioner fails to assert a single credible basis for granting his petition. Petitioner does not challenge the adequacy of the settlement hearing conducted by the District Court that determined that the settlement was "fair, just and appropriate." Nor

does Petitioner directly challenge the standard of review utilized by the Second Circuit in affirming the approval of the settlement by the District Court. Rather, Petitioner attempts to fabricate a ridiculous conflict between the Second and Third Circuits regarding the standard of review applied to the adequacy of representation requirement under Fed. R. Civ. P. 23 when a class action settlement is reached before a class is certified. However, even a cursory review of each Circuit's controlling authority on this issue reveals that no such conflict exists. This is merely an improper attempt to have this Court reconsider factual arguments that have twice been rejected by the lower courts. The Petitioners' contentions are specious and nothing more than a patent effort to harass Respondents and further delay the distribution of the settlement proceeds to class members who have been waiting one year for their distributions.

A. The Standards For Approving A Class Action Settlement Are Well Established

"[C]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *City of Detroit v. Grinnell Corporation*, 495 F.2d at 448. Indeed, there is a "general policy favoring the settlement of litigation." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). This is particularly true in the context of complex litigation and class actions. See *In re Drexel Burnham Lambert Group Inc.*, 960 F.2d 285, 292-93 (2d Cir. 1990), *cert. denied*, 506 U.S. 1088 (1993).

The following nine factors are considered in evaluating the reasonableness of a settlement, as articulated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund relative to a possible recovery in light of all the attendant risks of litigation.

As the Second Circuit held, Judge Raggi "meticulously considered" the entire record and made specific findings, fully supported by the record, as to each of the *Grinnell* analysis factors:

1. The Complexity, Expense And Likely Duration Of The Litigation

The District Court properly viewed this case as "extremely complex, very lengthy and very expensive for all parties involved." (JA 1034).

This action had been pending for over 1 1/2 years. Without the Settlement, the conclusion of this Action would unquestionably consume years.

The Hadj issues raised in this action involve complex issues of law and fact, which would turn on close factual questions involving the internal workings of an Indonesian-owned foreign airline and of Tower Air. The non-Hadj issues also involved many accounting and business decisions at Tower Air, and complex legal questions as to what should have been disclosed.

2. The Reaction Of The Class And Shareholders To The Settlement

Virtually the entire class supports the proposed settlement and would prefer the certainty of a $2.5 million settlement than the risks of pursuing the non-Hadj claims.

Pursuant to the District Court's Preliminary Settlement Approval Order (Docket Entry No. 30), more than 5,000 Notices and Proof of Claim forms have been sent to potential Class members, and the Summary Notice was published in the national edition of *The Wall Street Journal* (Docket Entries Nos. 49-50).

Despite this extensive notice campaign to all of the owners of Tower's 3.75 million publicly held shares, only Petitioner Branch—a purchaser of 100 shares of Tower Air stock who suffered about a $1,000 paper loss—objected to the Settlement.[3] This overwhelmingly positive response from the Class supported approval of the Settlement. See *City of Detroit v. Grinnell Corp.*, 495 F.2d at 462 ("the favorable reception of the settlement offer . . . is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion.").

3. The Stage Of The Proceedings And The Amount Of Discovery Completed

The District Court properly found that this Settlement was reached only after sufficient discovery to make an informed analysis had been conducted. (JA 1037-39).

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[3] On the eve of the Settlement Hearing, an undated fax, with no return address or fax header, and bearing no proof that it was sent by a Class Member, was faxed to plaintiffs' counsel from one "M. Schwartz" and "J. [illegible]", complaining about mismanagement at Tower Air and the amount of attorneys' fees sought (Docket Entry No. 48). The District Court graciously treated the letter as an objection. Additionally, three class members—representing about 11,000 shares—opted out of the Class (JA 1055).

With respect to the Hadj claims, the District Court was "satisfied that the amount of discovery is significant and requires nothing further for intelligent decisions to be made about settlement." (JA 1037).

With respect to the non-Hadj claims, despite Petitioner's contention that the discovery was not adequate, the District Court carefully "reviewed all of the papers, again, and particularly focusing on the exhibits attached to all of the papers . . . [was] satisfied that plaintiff's counsel, experienced in this area and with an apparent sensitivity to the claims of his client, [was] not prematurely compromising these claims." (JA 1037-38).

The Stipulation of Settlement was not executed until the depositions of three top Tower Air officials had been taken and thousands of documents reviewed. The litigation had, therefore, reached the stage in which the parties certainly had a clear view of the strengths and weaknesses of their cases. *See In re Drexel Burnham Lambert Group*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,205, at 91,085 (S.D.N.Y. Aug. 10, 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1070 (1993); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64, 70 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

4. The Risks Of Establishing Liability

The District Court, obviously familiar with all of the Hadj and non-Hadj issues, recognized that there "is a real risk to plaintiff in establishing liability on all of the claims brought here, including the Hadj claims. . . . [T]here are real defenses here and they would be vigorously pursued." (JA 1039). "Having reviewed all of the papers", Judge Raggi stated that she "can clearly understand why [Class Counsel] thought that . . . . the strongest if indeed only claim that they thought they could pursue was the Hadj claim." (JA 1007). "My overall review of the record suggests that the strongest claim that can be advanced under the securities laws is the one that was [initially] brought before this Court [the

"Hadj claim"]. Even there. . . there are triable issues, but that seems to me to be the issue on which the Class was most likely to achieve any recovery." (JA 1036).

a. The Hadj Claims and Defenses

Plaintiffs allege in the Complaint that the Defendants violated Sections 11 and 12(2) of the Securities Act of 1933 because the Registration Statement and Prospectus failed to disclose that in excess of eight percent of Tower Air's 1993 revenues were dependent on a yearly contract with one customer—Garuda—and misrepresented that it was reasonable for the Company to anticipate that it would renew this contract in the future. Plaintiffs would seek to prove that, prior to the Offering, Defendants were aware that the age of most of Tower Air's aircraft made them ineligible under Garuda's bid selection criteria.

Defendants would argue that they did not have to disclose that the pilgrim charter business was derived from one customer under SEC regulations, that this information could nevertheless be derived from the Company's financial statements and that they fully and properly disclosed all material facts regarding the tentativeness of Tower Air securing future contracts for the Hadj. (JA 775-76). Additionally, Defendants would have pointed out that in previous years, Garuda had waived their preference for newer aircraft and had actually indicated a desire for Tower to serve again in the future (as actually occurred in 1995 and 1996). (JA 90-92; 776). While Plaintiffs believe they could have overcome these disclosure arguments, success was by no means assured.

b. The Non-Hadj Claims and Defenses

Establishing liability and damages for the non-Hadj claims, as the District Court found, would be "a very tough road to hoe." (JA 1010).

After extensive consideration, Class Counsel determined that virtually all of the non-Hadj claims were factually with-

out basis. This was fully discussed in the Affidavit of Stanley D. Bernstein in Support of the Settlement (JA 752; 761-768). For example, Petitioner originally asserted that Tower Air recorded its aircraft assets at book value, rather than fair market value, thereby failing to disclose the substantial difference between the two. (JA 464-465). Class Counsel and Tower Air's counsel responded to this frivolous Objection by establishing beyond question that generally accepted accounting principles mandate disclosure based on book value. (JA 762-63; Docket Entry No. 52, Defendants' Memorandum In Support Of The Proposed Class Action Settlement, pp. 17-21). Class Counsel and Tower Air's Counsel also pointed out that—and this is curiously overlooked by Petitioner—that the Prospectus discloses that Tower Air recently had purchased a Boeing 747 for $4 million—the exact "value" which Petitioner claims was not disclosed. (Cf. JA 838 and 902 with JA 464-65).

Petitioner apparently recognized the frivolity of his book value/fair market value claim, since, at the Settlement Hearing, Petitioner cited for the first time one of the few exceptions to the book value requirements of GAAP—the argument that Tower Air should have recorded the fleet value at fair market value because Tower Air had allegedly decided in 1993 to retire certain planes in four years. (*Cf.* Objections, ¶¶ 8-14 [JA 464-65] to transcript of Settlement Hearing at 10-11 [JA 1002-03].)[4]

In fact, Tower Air's Vice-President of Maintenance did not testify—as Petitioner contends he did—that Tower Air had decided to retire these planes (Petitioner's Brief, pp. 17-18). He testified that no decision had been made on the issue. (JA 278-79). Moreover, the Prospectus fully disclosed that

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[4] This would not be the first time Objector's counsel raised frivolous claims in the course of a securities class action. In *Rubin v. Long Island Lighting Company*, 576 F. Supp. 608 (E.D.N.Y. 1984), Judge Bartels sanctioned Avrom Fischer, Esq., attorney for the Petitioner herein, for alleging a "theory of recovery [which] can only be described as frivolous." 576 F. Supp. at 612.

Tower Air was only considering retiring the planes (JA 853) and, in fact, the planes have had the necessary maintenance performed and are still flying. (JA 269-79).

Petitioner's claims regarding the estimated cost of compliance with FAA Aging Aircraft Directives, *i.e.*, that the $700,000 estimate in the Prospectus was too low, was superficially attractive, but, upon closer examination, of no consequence. Discovery revealed that the estimate (JA 834)—and, it was only an estimate—was based on the then best estimate of compliance by Tower Air with FAA directives, given the exact circumstances of Tower Air's fleet (*i.e.*, the age, state of repair, previously experienced partial compliance with the directives and Tower Air's inventory of parts). (JA 766-67; 269-285). The increased estimated costs disclosed in March 1995 were primarily attributable to FAA directives issued *after* the IPO—a risk which was disclosed in the Prospectus. (JA 834). Moreover, as demonstrated in the Jarrell Affidavit (JA 527 *et seq.*), the totality of the alleged under-estimated expenses simply would not be material to Tower Air or a reasonable investor in Tower Air. (JA 535-36).

Petitioner claims that Tower Air suffered an excessive number of in-flight engine shutdowns in 1993, but does not explain why this would be of concern to investors. None of the shutdowns caused an emergency landing or any injury (JA 260), and the shutdowns, occurring primarily during Tower Air's Hadj charter in 1993, did not impact Tower Air's ability to secure an increasing amount of Hadj business in 1995 and 1996. (JA 765; 90-95; 131-36; 251-52). Whether the shutdowns were caused by desert conditions (as Tower Air claims) (JA 251-52) or other factors (as Petitioner claims) (Petitioner's Brief, pp. 25-28) is simply irrelevant to investors, especially since the high shutdown rate in May 1993—six months before the IPO—had been solved by the time of the IPO. (JA 172).

Additionally, the fact that the Southern District Branch Action has been dismissed by Judge Keenan (albeit without

prejudice) heightens the inherent risks and uncertainty in the continued prosecution of the non-Hadj claims.

Thus, the record amply supports Judge Raggi's findings that there were real risks of establishing liability with respect to both the "Hadj" and "non-Hadj" claims.

5. The Risks Of Establishing Damages

The District Court focused, and quite properly so, on the fundamental question of whether any of the Petitioner's claims, even if substantively correct, in fact caused or would cause any securities law damages. (JA 1010, 1015, 1039). "The risks of establishing damages here seems even higher [than establishing liability] to me and particularly with respect to the Branch [non-Hadj] claims." (JA 1039).

"[E]ven assuming that some of the [non-Hadj] claims had merit, as well as the [Hadj] claim, the ultimate jury question would be: How much damage was caused by that?" (JA 1036).

Class Counsel submitted the expert affidavit of Professor Gregg A. Jarrell, former chief economist of the Securities and Exchange Commission, to render an analysis of the materiality of the various Hadj and non-Hadj claims and objections and an analysis of the damages arising therefrom.

In a thorough and scholarly analysis which examined the Hadj and non-Hadj claims, and Tower Air's stock price movement from the time it went public, (JA 527-751), Professor Jarrell rendered the following key opinions:

1. Maximum recoverable damages under Section 11 of the Securities Act of 1933 were approximately $12 million;

2. These damages were caused exclusively by the disclosures underlying the "Hadj claims", and;

3. The "facts" underlying the "non-Hadj claims" are not the type of information which would be material to

investors and, based on a study of Tower's trading history from the time of the IPO until the settlement, those "facts" did not account for any of the decline in Tower Air's stock price.

Petitioner submitted an estimate of potential Section 11 damages of $23 million. This analysis by Mr. R. Alan Miller, a Philadelphia investment banker, was fundamentally flawed. (JA 510-23). First, in violation of Section 11, it calculates damages assuming that the Tower Air stock price in May 1994 is used. However, Section 11(e) mandates that damages be calculated using the selling price on the date that the first action is filed challenging a prospectus, here March 24, 1994. *E.g. Beecher v. Able*, 435 F. Supp. 397, 402 (S.D.N.Y. 1975). Notably, by using the statutorily wrong selling date, when Tower Air was selling at nearly $5 below the price when the Action was filed, Petitioner's expert artificially inflated his damages analysis by about ten million dollars.

Moreover, not even Miller opines that any of the decline in Tower Air stock was attributable to any of the alleged misrepresentations or omissions (whether related to the Hadj or non-Hadj claims); he simply calculates market losses.

Petitioner's recognition that there are no securities law damages attributable to the non-Hadj claims demonstrates beyond doubt the frivolity of the objections and the correctness of the District Court's opinion.

6. Risk Of Maintaining A Class Action Through Trial

The District Court found that there would be no problem maintaining the Action as a class action through trial and further "that from the assessment of [class counsel], I'm sure that the class action would be maintained vigorously throughout a trial." (JA 1040). Petitioner does not challenge this finding.

7. Ability To Withstand A Greater Judgment

The parties did not contend that the defendants could not withstand a greater judgment than the settlement amount; however, the District Court viewed this situation in a very practical light: "the blunt reality [is] that over a certain number, a company would always litigate rather than pay a settlement." (JA 1040). Here, given that settlement negotiations were arms-length, extensive and supervised by Magistrate Judge Mann, and indeed it was Magistrate Judge Mann who recommended that this Action be settled for the $2.5 million which Class Counsel obtained, any possible recovery above $2.5 million would certainly have been obtainable only after many more years of litigation.

8. The Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery

The determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972). As the *Grinnell* Court appreciated, a "best possible" scenario must be tempered with a sizable dose of reality:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.

City of Detroit v. Grinnell Corp., 495 F.2d at 455.

In this case, Plaintiffs' Counsel estimate that the settlement amount represents about 20% of the total amount of losses realistically obtainable, at best. In light of the complexity in proving defendants' liability to the Class and to establishing compensable damages, the extraordinary time and expense that would be required to prosecute this case against multiple adversaries through trial and appeals, the Settlement approved

by the District Court was not only "fair, reasonable and adequate" but represents an excellent result.

9. The Range Of Reasonableness Of The Settlement In Light Of The Risks And Expense Of Litigation

The District Court recognized that the balance of the reasonableness of the settlement amount versus the risks of litigation was "in sharp dispute" and accordingly was "given some careful attention." (JA 1041). Having carefully reviewed the entire record, and considering and balancing the *Grinnell* factors, the District Court concluded: "when I balance all of the factors before me, I'm satisfied that this is a fair, just and appropriate settlement." (JA 1042-43).

Experienced counsel, negotiating at arm's-length and possessing all relevant information, recommended the Settlement to the District Court because they realize the risk of failure and the high costs attendant to continued litigation. The District Court properly considered such recommendation. (JA 1050); *Weinberger v. Kendrick*, 698 F.2d at 74.

The District Court correctly recognized that the Action involves complex issues which have been and but for this Settlement, would have continued to be fiercely contested by all parties for years, with recovery far from certain: "the risks of succeeding on the [Hadj] claim are such that the plaintiff has to be prepared to discount its claim considerably, that the risks of succeeding on the Branch [non-Hadj] claim, being even higher, it seems to me that the discounting should be even higher." (JA 1042). The District Court also properly factored in the two year plus delay that a trial would entail and balanced that against the certainty and value of a prompt recovery. E.g., *City of Detroit v. Grinnell*, 495 F.2d at 67.

The Second Circuit correctly held that the District Court properly applied all of the nine Grinnell factors, overruled the objections and approved the settlement.

B. The Standard Of Review Is Abuse Of Discretion

The determination of the fairness of a settlement agreement is left to the sound discretion of the trial court. *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991). Accordingly, on appeal, Petitioners to a class action settlement must make a "clear showing that the District Court has abused its discretion" before the approval will be reversed. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 455; *accord*, *Maywalt v. Parker & Parsley Petroleum Company*, 67 F.3d 1072, 1078 (2d Cir. 1995).

Judge Raggi carefully reviewed the terms of the Settlement, the process by which the Settlement was reached, the extensive record, the difficulties inherent in the case, and the objections asserted by Petitioner. It was only after this comprehensive analysis that Judge Raggi determined that the Settlement was fair, reasonable and adequate, that the objections should be overruled, and that the Settlement should be approved.

Notably absent from Petitioner's arguments before this Court is any statement, assertion or even suggestion that either the District Court or Second Circuit's reasoning was flawed or its findings were erroneous, let alone that either court abused its discretion. Rather, Petitioner simply regurgitates many of his "spiteful" and "wishful" objections without even attempting to identify whether, let alone how, the lower courts erred in their analysis.[5]

C. There Is No Conflict Between The Second and Third Circuits Concerning The Approval Of Class Action Settlements

The considerations governing review on certiorari set forth in Supreme Court Rule 10, though not limiting the discretion of the Court, support the denial of the petition for certiorari.

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[5] "A wishful thinker or spite monger" should not thwart a class action settlement that is in the best interests of the class. *Saylor v. Lindsley*, 456 F.2d 896, 899 (2d Cir. 1972).

No conflict exists between the Second Circuits' decision and the decisions of this Court, or the Third Circuit Court of Appeals, concerning the propriety of utilizing the 'abuse of discretion' standard as the standard of review when scrutinizing the approval of a class action settlement by a district court. *Compare Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) ("a district court's disposition of a proposed class action settlement should be accorded considerable deference and is reviewed for abuse of discretion) (citation omitted); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 782 (3rd Cir. 1995) ("[e]ach of the issues presented here [approval of proposed class action settlement, class certification, award of attorneys fees, and scope of discovery] is reviewable for abuse of discretion.")

Furthermore, even a cursory review of these cases demonstrates that the Second and Third Circuits employ identical standards when reviewing proposed class action settlements where the settlement is reached before the class representative and class counsel are certified. In *Weinberger v. Kendrick*, the Second Circuit stated that "when a class action settlement has been reached by means of settlement classes certified after the settlement, . . . district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care." 698 F.2d at 73. This is entirely consistent with the Third Circuit's admonitions in *In re General Motors Pick-up Truck Litigation* that when class action settlements are reached pre-certification "the need to assure an absence of collusion and an alignment of interests assumes an especially crucial role." 55 F.3d at 799 n.21. Indeed, the Third Circuit cited *Weinberger* in support of the proposition that "many courts have required the parties to make a higher showing of fairness to sustain these [pre-certification] settlements." *Id.* at 805. As the Second Circuit noted in its Summary Order affirming the approval of the Settlement, the District Court reviewed the Settlement and determined that it was not a product of collusion as required

by *Weinberger*. Petitioner's contentions are therefore meritless.

D. No Significant Question Of Federal Law Is At Issue

In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), this Court held:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.

This case presents no unsettled or important question of law. Petitioner's real complaint as to the decisions below concerns only questions of fact regarding the non-Hadj claims and his disagreement with the lower courts' evaluation of the factual issues. As stated above, the District Court conducted a thorough and detailed investigation regarding the relative merits of the Hadj and non-Hadj claims. The Second Circuit independently reviewed the record and affirmed the determinations of the District Court and rejected Petitioner's convoluted interpretation of the facts.

This Court has traditionally denied certiorari when a court of appeals decision turns upon an analysis of the facts. As Justice Holmes wrote in *United States v. Johnston*, 268 U.S. 220, 227 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

Accord, General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"). In *National Labor Relations Board v. Pitts-*

burgh Steamship Co., 340 U.S. 498, 503 (1951), the Court said that courts of appeal are courts of last resort as to matters of fact, even when the evidence might admit of varying interpretations:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544.

Accord, Federal Trade Commission v. Standard Oil Co., 355 U.S. 396, 400-01 (1958).

Petitioner attempts to style his claims as representative of a conflict between the Second and Third Circuits, or perhaps even rising to a Due Process issue, regarding interpretation of the adequacy of representation requirement of Federal Rule 23. However, this argument is unavailing since the law is well settled that "adequacy of representation and fairness of compromise are *questions of fact* for the district court." *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982) (emphasis added), and therefore may be overturned only if "clearly erroneous." *See Grover Tank & Mfg Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Accordingly, this Court has held that:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Id.; accord, Allen v. Trust Co. of Georgia, 326 U.S. 630, 636 (1946) ("concurrent findings of two lower courts will be accepted here without re-examination of the evidence.").

Furthermore, even if this Court were to review the findings of fact made by the District Court and affirmed by the Second Circuit, there is no way that this Court could conclude that the holdings of the lower courts were clearly erroneous. For, as this Court has held:

> A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." (citations omitted)

McAllister v. United States, 348 U.S. 19, 20 (1954). No such finding is possible in this case. In the perspective of the foregoing, Petitioner's refusal to accept the findings and conclusions of both lower courts is not a sufficient basis for the granting of a petition for certiorari.

VI. The Petition Is Frivolous and Damages and Double Costs Should Be Awarded to Respondent Plaintiff-Class

Section 1912 of title 28, United States Code, provides that where a judgment is affirmed by this Court or a court of appeals, the court in its discretion may "adjudge to the prevailing party just damages for his delay, and single or double costs."[6] *E.g., National Labor Relations Board v. Catalina Yachts*, 679 F.2d 180, 182 (9th Cir. 1982) (double costs and attorneys' fees awarded for frivolous appeal); *Browning Debenture Holders' Committee v. DASA Corp.*, 605 F.2d 35, 40-41 (2d Cir. 1978) (double costs and damages awarded for

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[6] Although denial of the Petition would not affirm the judgement below, in *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912), the Court, in construing the predecessor statute of section 1912, held that a dismissal of a writ of error is equivalent to a judgment of affirmance for purposes of awarding damages for frivolous delay.

appeal taken in bad faith); *Teledyne Industries, Inc. v. Podell*, 546 F.2d 495 (2d Cir. 1976) (double costs and attorneys' fees awarded for appeal which was without merit and frivolous); *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976) (double costs taxed personally against petitioner's counsel for frivolous and meritless petition interposed as a delaying tactic.) This provision is complemented by Supreme Court Rule 42.2 which states that when a petition for a writ of certiorari is frivolous, the Court may award just damages and single or double costs under Rule 43 to the respondent. *See e.g., Tatum v. Regents of the University of Nebraska-Lincoln*, 462 U.S. 1117 (1983). Respondent submits that such damages, including attorneys' fees, expenses and double costs, are appropriate here.

This class action litigation has been pending for nearly three years and the Settlement was approved by the District Court more than one year ago. During this entire period, class members have received none of the proceeds of the Settlement, despite overwhelming acceptance. Indeed, approximately 700 class members have chosen to participate in the Settlement and only three have chosen to opt out. Furthermore, Petitioner filed his petition for certiorari on the last day of the period within which a petition certiorari could be filed. Obviously, the Petition was an attempt to delay the distribution of the proceeds of the Settlement to the class members. It is pure malevolence and spite that motivates Petitioner, who now finds that his subsequently filed competing Class Action raising the non-Hadj claims has been defused. Petitioner is abusing the procedures of this Court to further wholly selfish aims despite the harm and prejudice to hundreds of class members who have chosen to participate in the Settlement.

The Petition is a frivolous delaying tactic. It is an abuse of the judicial system which should not be countenanced, and damages should be awarded in favor of Respondents.

VII. Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied in all respects and damages, including interest and attorney's fees and double costs should be awarded to Respondents.

Dated: New York, New York
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